United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

75-7341

United States Court of Appeals

FOR THE SECOND CIRCUIT

ARISTEDES A. DAY, THEODORA DAY and CONSTANTINE DAY, individually and ARISTEDES A. DAY and THEODORA DAY parents of CONSTANTINE DAY,

Plaintiffs-Appellees,

against

TRANS WORLD AIRLINES, INC.,

Defendant-Appellant.

KATE KERSEN, individually and as Administratrix and Administratrix Ad Prosequendum of the Estate of ELBERT KERSEN, deceased,

Plaintiff-Appellee,

against

TRANS WORLD AIRLINES, INC.,

Defendant-Appellant.

JOHN SPIRIDAKIS, BESSIE SPIRIDAKIS, LEONARD LAZARUS, SHIRLEY LAZARUS, ARNOLD ROSE and HELEN ROSE,

Plaintiffs-Appellees,

against

TRANS WORLD AIRLINES, INC.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFF-APPELLEE (KERSEN)

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BRIEF OF PLAINTIFF-APPELLEE (KERSEN)

Question Presented

Where the plaintiff and plaintiff's decedent (the Kersens) had handed their airplane tickets to employees of the defendant (TWA) and had received boarding passes

with seat selections on them and baggage checks for their luggage, passed through passport control, proceeded to the transit lounge for international passengers to which they were restricted, and were attacked by Arab terrorists while they were in line waiting to board the aircraft at a gate to which they were directed by a boarding announcement made by TWA, did the Court below err when it held that the plaintiff and her decedent husband were "in the course of any of the operations of embarking" under Article 17 of the Warsaw Convention?

Facts

Plaintiff seeks recovery in this action for the personal injuries, mental anguish and other damages she sustained and for the wrongful death of her husband, Elbert Kersen, which occurred as a result of an attack by unknown Arab terrorists at the Athens Airport, Athens, Greece, on August 5, 1973 (A 16).*

During August, 1973, the Kersens were vacationing in Greece. Prior to August 5, 1973, the Kersens purchased tickets on TWA's Flight 881, which provided for air transportation from Athens to New York City (A 97, 105a). The aircraft was scheduled to depart Athens Airport at 3:30 P.M. (A 98).

Prior to the scheduled departure time, the Kersens presented their tickets and luggage to TWA's ticket agent on the upper level of the airport (A 98). The agent removed the tickets from an envelope, and kept the ticket coupons (A 98). He then gave the Kersens boarding passes with seat selections on them and baggage checks for their luggage (A 98).

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* Numbers preceded by the letter "A" are references to the pages of the Appendix.

Thereafter, TWA's ticket agent directed the Kersens to passport control, which was also on the upper level of the airport (A 98). After their passports were stamped, the Kersens proceeded to the transit lounge on field level, where they were required to remain until they boarded the aircraft (A 98, 99). The transit lounge was level with the airport runways and the apron where the plane was parked to receive the passengers (A 98). While they were waiting in the transit lounge, TWA announced and directed passengers for Flight 881 to proceed to Gate 4 to be searched and to board the aircraft (A 98, 99).

To board the plane, the Kersens were to be personally searched and then were to proceed through the door of the transit lounge for a distance of approximately 100 yards to the aircraft (A 99). At approximately 3:15 P.M., while the Kersens were at Gate 4, standing in line to be searched, and just prior to walking out onto the field, several unknown Arab terrorists attacked persons in the waiting room including the Kersens with rifles, machine guns and hand grenades (A 99). Prior to the said attack, approximately seven passengers were screened and had passed through Gate 4 (A 110). As a result of the attack, plaintiff's decedent was killed and plaintiff sustained serious personal injuries (A 99).

Plaintiff moved for summary judgment with respect to the Third and Fourth Claims for Relief stated in her Complaint (A 18, 19, 92). Each said claim alleged TWA's absolute liability up to the sum of $75,000 based on Article 17 of the Warsaw Convention as supplemented by the Montreal Agreement. Plaintiff's motion contended that, as a matter of law, she and her husband were injured in the course of embarking operations under Article 17 of the Warsaw Convention. TWA cross-moved for summary judgment.

By a memorandum decision dated March 31, 1975 (A 108), and an Order dated April 16, 1975 (A 127), the

Court below granted plaintiff's motion for partial summary judgment on the issue of liability and denied TWA's cross-motion for summary judgment.

The Court below certified an interlocutory appeal under 28 U.S.C. § 1292. This Court granted permission to appeal on May 9, 1975.

POINT I

Defendant is liable to plaintiff up to $75,000 without proof of negligence on the Third and Fourth Claims for Relief under Article 17 of the Warsaw Convention as supplemented by the Montreal Agreement.

TWA's absolute liability in the case at bar results from a combination of a 1934 treaty (the Warsaw Convention) and a special contract (the Montreal Agreement) signed by TWA which incorporated the provisions of Civil Aeronautics Board Agreement 18,900. By signing the contract, TWA agreed to absolute liability under the Warsaw Convention, irrespective of whether or not it was negligent, and even if it was wholly free of negligence and did not cause the damages sustained by its passengers.

The Background and Purpose of the Warsaw Convention

In 1934, the United States became a party to this treaty, technically known as the Convention for the Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. 3000, Treaty Series No. 876, the Warsaw Convention. The overall objectives of the Warsaw Convention were twofold: (1) to provide uniform rules relating to air transportation documents (tickets, baggage checks, airwaybills) and (2) to limit the amount of damages for which the air carrier would be liable. *See, Block* v. *Compagnie Nationale Air France,* 386 F.2d 323, 327 (5th Cir. 1967), *cert. denied,* 392 U.S. 905 (1968); *Rosman* v. *Trans World Airlines, Inc.,* 34 N.Y.2d 385 (1974).

The Warsaw Convention applies to "all international transportation of persons [passengers], baggage or goods performed by aircraft for hire." Article 1(1).

The contract of transportation made between the Kersens and TWA, as set forth in the tickets issued by TWA (A 105a), provided for "international transportation" as defined in Article 1(2) of the Convention:

> "For the purposes of this Convention the expression 'international transportation' shall mean *any transportation in which, according to the contract made by the parties, the place of departure and the place of destination,* whether or not there be a break in the transportation or a transshipment, *are situated either within the territories of Two High Contracting Parties,* or within the territory of a single High Contracting Party . . ." (Emphasis added.)

The Warsaw Convention applies to the passage between the termini agreed upon by the carrier and the passengers, and as made at the time they enter into the contract. *Ross* v. *Pan American Airways,* 299 N.Y. 88, 97, 85 N.E.2d 885 (1949). The contracts are, of course, the passenger tickets sold by TWA to the Kersens, which provided for transportation between the United States (New York) and Greece (Athens), both parties to the Warsaw Convention. Thus, the Kersens were engaged in international transportation as defined by Article 1(2).

The liability of the carrier under the Warsaw Convention is specifically imposed by Article 17: "The carrier shall be liable for the damage sustained. . . ." The remainder of the quoted phrase will be discussed in greater detail in Point II, *infra,* p. 7.

Article 20(1) of Warsaw relieves the carrier of all liability to passengers if the airline proves it:

> ". . . had taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures."

However, it is appropriate to here note that TWA specifically waived any defense under Article 20(1) by signing the Montreal Agreement.

Warsaw's Article 22 limited damages to a maximum of $8,300 (recent devaluations have increased the limit to $10,000) per passenger. The dollar limitation was designed not to burden the infant airline industry. *Eck* v. *United Arab Airlines, Inc.*, 15 N.Y.2d 53, 59 (1964). The airlines and their governments desired that the Convention protect the carriers from exposure to unlimited damage awards based upon their common law liability. Thus, the Convention was drafted and should be construed to impose liability upon an airline at least in those circumstances where the airline could be liable at common law.

The Montreal Agreement

Many years after the ratification of Warsaw, and due to intense dissatisfaction with the inadequate $8,300 damage limitation, the United States formally denounced the Warsaw Treaty on November 15, 1965, with the cancellation to take effect six months later. As a result of numerous meetings of air carriers and governments, and in order to induce the United States to withdraw its denunciation of the Warsaw Treaty, the Montreal Agreement was created.

Under the Montreal Agreement, the defendant waived the $8,300 limitation contained in Warsaw's Article 22 and agreed to pay up to $75,000 to each injured or deceased passenger, waived any defense it might have under Article 20(1) of Warsaw and thereby accepted no fault liability.

The Montreal Agreement signed by defendant TWA (A 105b) states:

> "The undersigned carriers hereby agree as follows:
>
> ". . . the carrier agrees that, as to all international transportation . . . which, according to the Contract of Carriage, includes a point in the United States . . .

"(1) the limit of liability for each passenger for death, wounding or other bodily injuries shall be the sum of U.S. $75,000 . . .

"(2) the carier shall not . . . avail itself of any defense under Article 20(1) . . ."

Thus, by waiving the Article 20(1) defense (that the carrier took all necessary measures to avoid the damage or that it was impossible to take such measures), defendant TWA accepted the absolute liability imposed on it by Warsaw's Chapter II, Article 17 and "the carrier shall be liable for damage sustained . . ."

Accordingly, the Montreal Agreement modifies the effect of the Warsaw Convention only to the extent of providing for absolute liability up to $75,000; it does not change the substance of the liability provided in Article 17 of the Convention. It is, therefore, crystal clear from the Warsaw Convention and the Montreal Agreement supplementing that treaty, that defendant is absolutely liable in the instant case for damages not to exceed $75,000 per passenger, irrespective of whether or not the defendant was negligent or at fault, if Mr. and Mrs. Kersen were injured or killed "in the course of any of the operations of embarking . . ." under Article 17 of the Convention.

POINT II

Defendant is liable by reason of Article 17 because the Kersens were injured in the course of embarking operations.

Article 17 of the Warsaw Treaty states:

"*The carrier shall be liable for damages sustained in the event of the death or wounding of a passenger* or any other bodily injury suffered by a passenger, *if the accident* which caused the damage so sustained *took place* on board the aircraft or *in the course of any*

> *of the operations of embarking* or disembarking." (Emphasis added.)

Plaintiff respectfully submits that this Court should affirm the decision of the Court below that, as a matter of law, the Kersens were in the course of the operations of embarking at the time they sustained their injuries. By accepting their tickets and luggage at the ticket counter, TWA had accepted the Kersens as passengers. At that point, the Kersens commenced the embarking operation, but additional embarking event and activities occurred. TWA assigned the Kersens specific seats and issued them boarding passes for the aircraft. TWA then directed the Kersens to and they passed through passport control. Thereafter, they assembled with other passengers in the transit lounge. At that point, the Kersens were wholly segregated from the general public for they could not leave the lounge. TWA then announced that the aircraft was ready for the passengers and directed them to a specific gate. The Kersens proceeded, in accordance with TWA's directions, to the doorway where they lined up to be searched, after which they would walk onto the field and the plane. Some passengers had in fact been searched and proceeded out onto the taxiway when the attack commenced. The Kersens were injured during their last few steps before reaching the field and the adjacent TWA plane.

As stated by the Court below:

> "A consideration of the plain meaning of the words 'in the course of any of the operations of embarking' produces a single conclusion." (A 116)

The conclusion is inescapable that as a matter of law the Kersens were injured in the course of embarking operations.

In construing the Warsaw Convention, as with any other treaty, the Court will look to the ordinary meaning of its

terms. *Todok* v. *Union State Bank*, 281 U.S. 449 (1910); *Matter of Zalewski*, 292 N.Y. 332 (1944). If not already clear, the ordinary meaning of the language "in the course of any of the operations of embarking" can also be found in any quality dictionary. Webster's *New International Dictionary*, 2nd Edition, defines "Course" as the act of moving from one point to another, a series of motions or acts arranged in order of succession; a customary or established sequence of events; an orderly progress or procedure. "Operation" is defined as an act or process done as part of practical work or involving practical application of a principle or process. "Embarking" is defined as causing to go on board a vessel. Funk & Wagnalls *New Standard Dictionary of the English Language* (1949), which was relied on by the Court below (A 115), similarly defines the above terms.* Thus, the key phrase (in the course of embarking operations) may be further defined as a series of acts in an established sequence in the process of boarding. The Kersens commenced the boarding process when TWA accepted their tickets. At the minimum, they were in the course of boarding when segregated from the public in the transit lounge and queued up to walk onto the field.

Beyond the literal and plain meaning of the key phrase, the plaintiff's position is also established by consideration of the treaty's purpose—to protect the airline from the risk of paying full damages above the $8,300 limit. Correlatively, the purpose of the treaty is served by broad application of its protective umbrella. To hold that the Kersens were not in the course of embarking would render the treaty inapplicable and thus impose upon TWA liability for full damages upon proof of negligence. This

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* There is ample authority for the judicial use of dictionaries as an aid to construction. *Caddy* v. *Interborough Rapid Transit Co.*, 195 N. Y. 415 (1909); *Hempstead* v. *New York*, 52 App. Div. 182 (2d Dept. 1900).

is precisely the kind of common law liability that the Warsaw Convention sought to avoid.

When the Warsaw Treaty was adopted by the United States in 1934, it was commonly recognized that an airline risked liability for accidents occurring off aircraft during the operations attending air travel. The then existing law is discussed fully in Point III, *infra*, p. 15. This recognition by the common law continues to the present. For example, in *Garrett* v. *American Airlines, Inc.*, 332 F.2d 939 (5th Cir. 1964), a passenger was injured when she fell over another passenger's luggage while waiting in a departure lounge. The Court held that the carrier had a duty to protect its passenger and reversed a directed verdict for the defendant. Consequently, the Article 17 umbrella covers departure lounges, such as the one at bar, because at those places passengers are in the course of an embarking operation.

The entire thrust of defendant TWA's position is that the critical phrase "any of the operations of embarking" was intended, although not stated, by the drafters of the Convention to mean "any of the operations of embarking occurring outside all terminal buildings." TWA's position thus distorts the clear language of the phrase and the purpose of the Treaty, particularly as applied to the facts in the case at bar. In order to adopt TWA's position, it would be necessary to recast the language of Article 17. It has long been the rule, however, that treaties are not to be revised or amended in the course of their construction.

> "[T]his Court does not possess any treaty-making power. That power belongs by the Constitution to another department of the Government; and to alter, amend or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial function. It would be to make not to construe a treaty." *The Amiable Isabella,* 19 U. S. (6 Wheat.) 1, 71 (1821).

It must be emphasized that this Court need not and plaintiff does not espouse the establishment of a general principle to govern future cases or even this case. Plaintiff merely asks this Court to hold, as did the Court below, that based on the particular facts of this case, the Kersens were injured in the course of *one* of the embarking operations as a matter of law. Plaintiff simply states that having been accepted as passengers by TWA, when their tickets were taken and baggage accepted, having been given boarding passes with seat selections, having passed through passport control, having been restricted to the transit lounge, the flight boarding announcement having been made, the plaintiff and her husband then lining up at the last interior doorway before going outside to board the plane, that the plaintiffs were, *at that point,* in the course of *one* of the operations of embarking. In the event this Court nevertheless desires to formulate a general rule to govern this and future cases, it is clear that the acceptance by TWA of a passenger by taking his ticket is the critical turning point. TWA, on the other hand, asks this Court to establish a general rule distinguishing between accidents occurring inside and outside terminals as determinative of the issue raised by the instant appeal.

The fallacy of such a rule is evident. The language of the critical phrase "in the course of any of the operations of embarking" demonstrates that the applicability of *Article 17 is to be determined based upon what the passenger is doing, not,* as TWA suggests, *where the passenger is located.* In the case at bar, standing in line to be searched to pass through the door of the terminal to the aircraft, is one action in a series of actions which comprise the boarding process.

As a matter of fact, the drafters of Warsaw specifically rejected a geographical approach to the carrier's liability. The drafters of the Warsaw Convention rejected an article (C.I.T.E.J.A. draft Article 20) which would have estab-

lished the carrier's liability based upon the passenger's location, that is, from the time when the passenger entered the airport limits of the airport of departure until the time when the passenger exited the airport limits from the airport of arrival (cited at page 13 of TWA's Brief). TWA would have this Court hold that the Warsaw drafters, having rejected a geographical test, substituted another test based upon the same approach. The actual language of Warsaw is to the contrary and TWA nowhere cites any discussion by the Warsaw drafters to negate liability for accidents occurring in the terminal of the airport.

Significantly, TWA does not cite a single pre-Warsaw quotation or paraphrase any delegate to the Convention, which would suggest that the liability of the carrier is limited to events occurring outside the terminal building after the acceptance of the passenger by the carrier. Defendant's only citation which even mentions terminal buildings as distinguished from airport limits is Dr. Riese's article (cited in TWA's Brief at page 18), which was written in 1951, over 20 years after the promulgation of the Warsaw Treaty. To cite Dr. Riese's 1951 opinion as authoritative is equivalent to citing a United States Congressman's opinion of a statute which has been passed 20 years before. Even Dr. Riese does not assert that Warsaw does not apply once the passenger is accepted by the carrier.* Thus, if a passenger is in the airport terminal building *prior* to being accepted as a passenger by the airline, Dr. Riese would opine that the carrier was not liable. In our case, however, the Kersens were accepted

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* Similarly, the paper of Mr. Goedhuis (cited at pages 19-20 of TWA's Brief) and Mr. Drion's article (cited at page 19 of TWA's Brief) do not preclude coverage for a passenger once he has been accepted by the carrier.

by the airline and were standing in line, at TWA's direction, at the exit of the terminal to board the aircraft.

TWA's bald assertion that "all authorities" dealing with Article 17 hold that that Article excludes coverage for accidents inside terminal buildings (TWA's Brief at page 22), is grossly misleading. TWA has cited six cases in support of its position, four cases cited in the United States and two French cases.

In *Mache* v. *Air France,* the Court considered whether a passenger was *in the course of disembarking.* The French Court's *dicta* that the Warsaw Convention only applies to operations taking place on the traffic apron is incorrect and it clearly contradicts the language of Article 17 and the overall objectives of the Warsaw Convention. The New York Court of Appeals recently held that French law did not govern the meaning and scope of the Convention. *Rosman* v. *Trans World Airlines, Inc.,* 34 N.Y.2d 385, 358 N.Y.S.2d 97 (1974). In *Rosman,* the Court stated:

> "There is no suggestion in the Treaty that French law was intended to govern the meaning of Warsaw's terms, nor have we found any indication to this effect in its legislative history or from our study of its application and interpretation by other Courts. Indeed, analysis of the case indicates that the courts, in interpreting and applying the Warsaw Convention, have not considered themselves bound to apply French law, simply because the Convention is written in French." 358 N.Y.S.2d at 105.

Dame Forsius v. *Air France,* the other French case cited by TWA as "virtually on all fours with the case before the court" involved a slip and fall in the customs area of Orly Airport in Paris, France. Said fall was allegedly due to the type of material used in constructing the floor, which floor was not constructed by Air France. The opinion in *Forsius,* contrary to the impression TWA seeks

to create, gives no indication that the accident occurred in a place equivalent to the transit lounge involved in the case at bar. Significantly, *Forsius* does not cite the earlier *Mache* case, which contains the *dicta* relied on by TWA. More importantly, the *Forsius* opinion does not indicate that the passenger had been given a boarding pass or that boarding for the flight had been announced as in the case at bar. It is, moreover, very clear that the passenger in *Forsius* was not injured, as here, while she was waiting in line at the exit of the terminal to board the aircraft.

Three of the cases decided in the United States: *MacDonald* v. *Air Canada,* 439 F.2d 1402 (1st Cir. 1971); *Felismina* v. *Trans World Airlines, Inc.,* 13 Avi.L.Rep. 17, 145 (S.D.N.Y. 1974), and *Klein* v. *KLM Roy Dutch Airlines,* 46 A.D.2d 679, 360 N.Y.S.2d 60 (2d Dept. 1974), also involve disembarking operations and all involve accidents occurring in baggage claim areas of the airport. In both *Klein* and *Felismina*, the Courts held that since the plaintiffs had completed disembarking operations, Article 17, and the Treaty's limitation on the amount of recoverable damages were inapplicable, the actions were governed by principles of common law negligence upon which full damages could be recovered. The Convention, it will be recalled, was drafted in order to protect airlines from exposure to unlimited damage awards based upon their common law liability. Thus, in order to effectuate the purpose of the Treaty, the protective umbrella of the Convention including Article 17 and the Treaty's limitation on damages, must cover the Kersens as they stood in line to exit the last door and board the waiting plane.

The Court in *MacDonald, supra* held that the airline was not liable under Article 17 because the plaintiff had not proved that an "accident" had occurred. The Court then stated, in *dicta,* that it would seem that a passenger could recover against the airline under Article 17 for events occurring up to reaching a safe point inside the

terminal. The Court specifically indicated that it was *not* setting forth a general rule concerning when liability commenced under Article 17:

> "Without determining where the exact line occurs, it had been crossed in the case at bar." 439 F.2d at 1405.

It is significant that in none of the above cases cited by TWA were the passengers standing in line to get aboard the aircraft. In the case at bar, the Kersens were standing in line to board the aircraft at the last door before proceeding out onto the field to board the aircraft. The Kersens were thus in the very process of embarking when they were injured. The decision to the contrary in *Evangelinos* v. *Trans World Airlines, Inc.*, Civil Action No. 74-165 (W.D. Pa. 1975) (an action arising out of the instant accident), should be rejected for the reasons stated herein and in the opinion below.

The undisputed facts at bar clearly demonstrate that the Kersens were injured in the course of embarking. The language of Article 17, the purpose of the treaty and the pre-existing and current common law separately and collectively compel affirmance of the decision below granting partial summary judgment to the plaintiff.

POINT III

Since the Kersens were passengers of the defendant, it would be liable at common law upon proof of negligence.

Long before the dawn of aviation and the Warsaw Convention, it was held that the relationship between passenger and carrier exists beyond the mere physical presence of the passenger on board the conveyance. *Zeccardi* v. *Yonkers Ry. Co.*, 190 N.Y. 389, 83 N.S. 31 (1907) (plaintiff left the defendant's train and was assaulted by defendant's

conductor while on the ground); *Tonkins* v. *New York Ferry Co.*, 113 N.Y. 653, 21 N.E. 414 (1889) (plaintiff, while in a waiting room, was pushed by a crowd out into a roadway where he was struck by a truck).

In *Busch* v. *Interboro Rapid Transit Co.*, 110 App. Div. 705, 96 N.Y.S. 747 (1st Dept. 1906), *aff'd.*, 187 N.Y. 388 (1907), the carrier was held liable to a passenger who purchased a ticket and was injured while waiting for a train to arrive:

> "He was just as much a passenger after he entered upon the platform as he would have been had he entered a car. The relation was precisely the same, because he got upon the platform only by the purchase and surrender of his tickets." *Id.* at 748.

Similarly, in *Palmeri* v. *Manhattan Ry. Co.*, 133 N.Y. 261 (1892), plaintiff purchased a ticket and was waiting on the platform when he sustained injuries. In holding for the plaintiff, the Court stated:

> "Once the relation of carrier and passenger is entered upon, the carrier is answerable for all consequences to the passenger of the willful misconduct or negligence of the persons employed by it in the execution of the contract which it has undertaken toward the passenger." *Id.* at 265.

This common law principle, well-rooted before Warsaw's adoption, has continued to thrive and has been extended to aviation cases. In *Polara* v. *Trans World Airlines, Inc.*, 284 F.2d 34 (2d Cir. 1960), the plaintiff disembarked and arrived at the baggage claim area when he discovered the absence of his wallet. To return to the plane, he followed a passageway to which the defendant had directed him and fe[illegible] The Second Circuit held that the carrier's negligence [illegible] an issue for the jury. Similarly, in *Gold* v. *Swiss Air Transportation Co., Ltd.*, 33 A.D.2d 777, 307

N.Y.S.2d 166 (2d Dept. 1969), the plaintiff was held to occupy the status of passenger even when in a restroom.

In *Garrett* v. *American Airlines, Inc.*, 332 F.2d 939 (5th Cir. 1964), the passenger was injured when she fell over another passenger's luggage in the departure lounge while waiting for the plane. The lounge area was not operated by the defendant airline, and yet the court held that the carrier was under a duty to protect plaintiff-passenger and the jury verdict would remain undisturbed. To the same effect, *Laney* v. *American Airlines, Inc.*, 295 F.2d 723 (6th Cir. 1961); *Delta Airlines, Inc.* v. *Millirons*, 87 Ga. App. 334, 73 S.E.2d 598 (1952); *Green* v. *Taca International Airlines*, 293 So.2d 198 (La. App. 1974); *City of Knoxville, Tennessee* v. *Bailey*, 222 F.2d 50 (6th Cir. 1955); *Ortiz* v. *Greyhound Corp.*, 275 F.2d 770 (4th Cir. 1960); *Simpson* v. *United Airlines, Inc.*, 10 Avi. 17,965 (Pa. Common Pleas 1967).

In *Crowell* v. *Eastern Air Lines, Inc.*, 240 N.C. 20 (1954), plaintiff was injured in a passageway furnished for boarding airplanes of defendant airline by the City of Charlotte, North Carolina. The Court nevertheless held that the airline was obligated by a common-law duty:

> "The plaintiff was at the airport to board as a passenger an airplane of the Airline; it was the duty of Airline to furnish her with a reasonably safe passageway from the waiting room of the airport to its aircraft she had bought a ticket to board . . ." 81 S.E.2d at 187.

These non-Warsaw common law cases define the scope of the air carrier's duty and corresponding risk of liability to include boarding areas, such as the final interior transit lounge in the case at bar. Consequently, in order to effect the purpose of the Treaty, the protective umbrella of Article 17 must cover the subject transit area and the Kersens as they stood in line to exit the last door and cross the apron to the waiting plane.

CONCLUSION

The decision and order below granting partial summary judgment to the plaintiff on the issue of liability on the Third and Fourth Claims for Relief and denying TWA's cross-motion for summary judgment on the issue of liability should be affirmed in all respects.

Respectfully submitted,

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